U.S. Department of Justice

United States Attorney
Southern District of New York

United States District Courthouse
300 Quarropas Street
White Plains, New York 10601

April 12, 2016

BY ECF AND EMAIL

The Honorable Shira A. Scheindlin
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: *United States* v. *Kevin Ruck*, 15 Cr. 602 (SAS)

Dear Judge Scheindlin:

The Government respectfully submits this letter in advance of the sentencing of the defendant, Kevin Ruck. As set forth in the Plea Agreement and the Presentence Investigation Report ("PSR"), the Guidelines range is 63 to 78 months' imprisonment. The Probation Office recommends a sentence of 24 months' imprisonment, while the defendant requests a sentence of probation. For the reasons set forth below, the Government submits that a sentence below the Guidelines range, but substantially greater than 24 months, would be fair and appropriate.

A. Background

1. The Offense

For several years, from at least May 2012 to January 2015, the defendant downloaded and viewed child pornography using his computer and the internet. He downloaded files containing child pornography from other users on the BitTorrent peer-to-peer ("P2P") file sharing network, using the uTorrent P2P file sharing client. The defendant downloaded files containing child pornography several times per week, searching for child pornography on the BitTorrent P2P network using search terms commonly used by collectors of child pornography to name child pornography files and to locate child pornography. He kept the files containing child pornography that he downloaded in a folder on his computer named "Download". The defendant had thousands of files containing child pornography on his computer, and he was aware that downloading and possessing child pornography is illegal. PSR ¶ 14; Plea Tr. at 12-13.

The defendant understood that by using the BitTorrent P2P network, he was allowing other users on the network to view and download his files, including the files containing child pornography. The defendant understood that he was thus distributing his child pornography files on the file sharing network. Plea Tr. at 13.

In December 2014, the FBI engaged in undercover downloads of nearly 2,000 images and two videos of child pornography and erotica from a computer connected to the defendant's IP address. PSR ¶¶ 7-12. The FBI subsequently seized a computer from the defendant's residence while executing a search warrant authorized by this Court. A forensic analysis of that computer revealed approximately 24,900 images and 29 videos of child pornography and erotica. PSR ¶ 15. Based on a review of samples of the files downloaded by the FBI from the defendant's IP address and the files contained on the defendant's computer, an FBI special agent estimates that approximately half of the images constitute child pornography rather than child erotica, and a majority of the images depict prepubescent children. PSR ¶ 17.

The child pornography images and videos downloaded from or found on the defendant's computer generally depict prepubescent girls exposing and touching their genitals. PSR ¶¶ 7-9, 11-12, 15. However, the samples of files review by the FBI special agent also include more graphic depictions, including a video showing a prepubescent girl performing oral sex on an adult male and the adult male digitally penetrating the girl's vagina; a video of two girls performing sex acts on each other; and an image of a girl penetrating herself with a foreign object. PSR ¶¶ 8, 15, 17.

The defendant was initially charged by Complaint with transporting, receiving, and possessing child pornography. PSR ¶ 16. The defendant subsequently waived indictment and agreed to the filing of a one-count Information charging him with possessing, from at least May 2012 through at least January 2015, images of child pornography, including images of prepubescent minors and minors who had not attained 12 years of age, in violation of Title 18, United States Code, Section 2252A(a)(5)(B) and (b)(2). PSR ¶ 1. On September 2, 2015, the defendant pleaded guilty, pursuant to a plea agreement, to Count One of the Information. PSR ¶ 3.

2. The Presentence Investigation Report and Recommended Sentence

In its PSR, the Probation Office agrees with the calculation of the appropriate offense level under the United States Sentencing Guidelines set forth in the plea agreement between the defendant and the Government. The defendant's adjusted offense level is 26:

- the base offense level is 18 for a possession conviction;
- a 2-level increase is warranted because the material involved a prepubescent minor or a minor who had not attained the age of 12 years
- a 2-level increase is warranted because the offense involved distribution
- a 2-level increase is warranted because the offense involved the use of a computer for the possession, transmission, receipt, or distribution of the material
- a 5-level increase is warranted because the offense involved 600 or more images; and
- a 3-level reduction is warranted for acceptance of responsibility.

PSR ¶¶ 3, 24-36. The Probation Office also agrees with the parties' plea agreement that the defendant has no criminal history points, and is therefore in criminal history category I. PSR ¶¶ 3, 39. Based on an offense level of 26 and a criminal history category of I, the Guidelines range for the defendant is 63 to 78 months, which is also the Stipulated Guidelines Range in the plea agreement between the parties. PSR ¶¶ 3, 74.

The Probation Office initially cited *United States* v. *Dorvee*, 616 F.3d 174 (2d Cir. 2010), as a factor that my warrant a departure, while stating that it had not identified any factors warranting a variance from the Guidelines range. PSR ¶¶ 85-86. In its final report, the Probation Office did not cite *Dorvee*, but it recommended a below-Guidelines sentence of 24 months' imprisonment, to be followed by a mandatory minimum term of 5 years of supervised release.

In the plea agreement, the defendant admitted the forfeiture allegations of the Information, agreed to forfeit any property use to commit the offense, and consented to the entry of the Consent Order of Forfeiture annexed as Exhibit A to the plea agreement, which provides for forfeiture of the computer the defendant used in connection with the offense.

B. Discussion

1. Applicable Law

The Guidelines are no longer mandatory, but they still provide important guidance to the Court following *United States* v. *Booker*, 543 U.S. 220 (2005), and *United States* v. *Crosby*, 397 F.3d 103 (2d Cir. 2005). "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," which "should be the starting point and the initial benchmark." *Gall* v. *United States*, 552 U.S. 38, 49 (2007).

After making the initial Guidelines calculation, a sentencing judge must consider the factors outlined in Title 18, United States Code, Section 3553(a), and "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing outlined in 18 U.S.C. § 3553(a)(2). To the extent a district court imposes a sentence outside the range recommended by the Guidelines, it must "'consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *United States* v. *Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (quoting *Gall*, 552 U.S. at 50).

2. A Sentence Below the Guidelines Range, But Substantially Greater than 24 Months, Is Reasonable in this Case

The applicable Guidelines range in this case is 63 to 78 months' imprisonment. The Probation Office's requested sentence of 24 months would represent a sentence approximately 62% below the bottom of the Guidelines range. The defendant seeks an even greater variance from the Guidelines range, requesting a probationary sentence. Such large deviations are not warranted here.

A substantial sentence is needed to reflect the seriousness of the defendant's offense, to promote respect for the law, to provide just punishment for the offense, and to afford adequate deterrence to the defendant and others. *See* 18 U.S.C. § 3553(a)(2). As the U.S. Court of Appeals for the Second Circuit has observed:

> [T]here can be no question that the dissemination of child pornography is a serious crime that causes real injury to particularly vulnerable victims. As Congress, courts, and scholars all recognize, child pornography crimes at their core demand the sexual exploitation and abuse of children. Not only are children seriously harmed—physically, emotionally, and mentally—in the process of

> producing such pornography, but that harm is the exacerbated by the circulation, often for years after the fact, of a graphic record of the child's exploitation and abuse.

United States v. *Reingold*, 731 F.3d 204, 216 (2d Cir. 2013) (citing *New York* v. *Ferber*, 458 U.S. 747, 757-59 & nn. 9-10 (1982), for its collection of congressional and scholarly reports and court cases). Because "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," *Ferber*, 458 U.S. at 757, the interest extends to seeking to stamp out child pornography "at all levels in the distribution chain"—not just production and distribution of the images, but also their possession, *Osborne* v. *Ohio*, 495 U.S. 103, 110 (1990). And it is precisely because "[c]hild pornography harms and debases the most defenseless of our citizens" that "[b]oth the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet." *United States* v. *Williams*, 553 U.S. 285, 307 (2008).

The Probation Office nevertheless argues that a sentence of 24 months, far below the Guidelines range, is warranted, in part because the defendant has not committed a hands-on offense against a child and a forensic psychiatrist believes that defendant has a good prognosis. PSR at 22. But that sentence would inadequately account for the seriousness of what the defendant actually did, because the possession or distribution of child pornography is not "a victimless crime or one posing no threat of violence of physical harm." *Reingold*, 731 F.3d at 218. As courts in this Circuit have repeatedly recognized, possessing and distributing child pornography expands the market for such images and thus fuels the abuse and victimization of children. *See, e.g.*, *United States* v. *Forrest*, No. 14-4737, 2016 U.S. App. LEXIS 1932, at *7 (2d Cir. Feb. 5, 2016) (summary order); *United States* v. *Gouse*, 468 F. App'x 75, 78 (2d Cir. 2012); *United States* v. *Aumais*, 656 F.3d 147, 151 (2d Cir. 2011); *United States* v. *Johnson*, 221 F.3d 83, 98 (2d Cir. 2000). The market-expanding effects of possessing and distributing child pornography are particularly acute when the offense is committed by sharing files on the internet. As the Second Circuit has explained:

> The ease with which a person can access and distribute child pornography from his home—often with no more effort than a few clicks on a computer—may make it easier for perpetrators to delude themselves that their conduct is not deviant or harmful. But technological advances that facilitate child pornography crimes no more mitigate the real harm caused by these crimes than do technological advances making it easier to perpetrate fraud, traffic drugs, or even engage in acts of terrorism—all at a distance from victims—mitigate those crimes. If anything, the noted digital revolution may actually aggravate child pornography crimes insofar as an expanding market for child pornography fuels greater demand for perverse sexual depictions of children, making it more difficult for authorities to prevent their sexual exploitation and abuse.

Reingold, 731 F.3d at 217; *see also United States* v. *Lewis*, 605 F.3d 395, 403 (6th Cir. 2010) (noting that distribution through computers "is particularly harmful because it can reach an almost limitless audience" (quotation marks omitted) (citing H.R.Rep. No. 104-90, at 3-4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 759, 760-61)). Here, the defendant knowingly possessed and shared thousands of images of child pornography on the BitTorrent P2P network. Plea Tr. at 13.

As a result, he committed "a serious crime that threatens real, and frequently violent, harm to vulnerable victims." *Reingold*, 731 F.3d at 217.

The Probation Office cites several other factors in support of its recommendation of a large downward variance. The Probation Office notes, for example, that the defendant is a first-time offender. PSR at 22. But the vast majority of possession offenders are, like the defendant, in criminal history category I. U.S. Sentencing Comm'n, Report to Congress: Federal Child Pornography Offenses 143 (Dec. 2012) ("Report to Congress") (noting that 82.2% of possession offenders in 2010 were in category I), *available at* http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses. The defendant thus "is no outlier; he is, on the contrary, plainly in the 'heartland' of offenders." *United States* v. *Goff*, 501 F.3d 250, 261 (3d Cir. 2007).

The Probation Office also observes that the images possessed by the defendant were not as graphic or violent as images possessed by some other offenders. But the Guidelines range already accounts for that fact, because the offense level does not include the 4-level enhancement for sadistic, masochistic, or violent images. *See* U.S.S.G. § 2G2.2(b)(4). Furthermore, the absence of violent images is outweighed by two other factors here: the age of the many of the victims and the number of images. The defendant's computer contained approximately 24,900 images and 29 videos of child pornography and erotica.[1] PSR ¶ 15. Based on an FBI special agent's review of samples of these images, about half of them constitute child pornography rather than erotica, and a majority of the images were of prepubescent children. PSR ¶ 17. Even if a much more conservative percentage were applied, it would still mean that the defendant possessed on his computer thousands of images of child pornography—and was thus sharing with others thousands of child pornography images (many of them depicting prepubescent children) on the file sharing network. "[P]ossession of even a small number of images of child pornography contributes to the victimization of children and creates a market for child abuse." *United States* v. *Miller*, 594 F.3d 172, 189 (3d Cir. 2010) (internal quotation marks omitted). The defendant's conduct here was far more serious.

It is not clear whether the Probation Office is relying on *Dorvee* in support of its recommended variance. The Probation Office cited *Dorvee* in its initial report but did not invoke the case by name in its final recommendation. In any event, *Dorvee* does not support a large downward variance here. As the Second Circuit has since recognized, *Dorvee* "advised district courts to exercise caution in imposing sentences for child pornography offenses at or near the statutory maximum 'even in run-of-the-mill cases.'" *United States* v. *Oehne*, 698 F.3d 119, 126 (2d Cir. 2012) (quoting *Dorvee*, 616 F.3d at 186); *accord Aumais*, 656 F.3d at 157. The concerns identified in *Dorvee* are inapplicable here because the Guidelines range of 63 to 78 months is nowhere near the statutory maximum of 20 years.

For his part, the defendant contends that a probationary sentence is warranted essentially because he has otherwise been a good person, has a supportive family, and has a promising career. The Government does not dispute the underlying assertions, but these factors did not prevent the defendant from starting to download child pornography in the first place, or from continuing to download child pornography several times a week for several years and sharing them online. Furthermore, even if one were to accept the implicit claim that the defendant will not reoffend, these factors still would not adequately address the need for the sentence to reflect the seriousness of the defendant's offense, to promote respect for the law, to provide just punishment for the offense, and to afford adequate deterrence to others. Indeed, it may well undermine respect for the law for defendants who come from much more troubled families and backgrounds to see a defendant receive a lenient sentence precisely because he started with a leg up in life.

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[1] Videos are treated as the equivalent of 75 images each. U.S.S.G. § 2G2.2 cmt. 4(B)(ii). As a result, the 29 videos add another 2,175 images to the count, for a total of approximately 27,075 images.

The defendant's request for a probationary sentence would also undermine respect for the law in that it would create unwarranted sentence disparities among similarly situated defendants. *See* 18 U.S.C. § 3553(a)(6). According to data compiled by the U.S. Sentencing Commission, in 2010, of 902 individuals convicted only of possessing child pornography, 875 (or 97%) received a sentence including a term of imprisonment. Only 27 of 902 possession offenders, or 3%, received a probationary sentence, as the defendant requests here. Report to Congress 131. There is nothing in the record to suggest that the defendant's case is that rare outlier that does not warrant a sentence of incarceration.

Finally, it should be noted that the Government considered all of the arguments raised above in exercising its discretion to permit the defendant to plead to a possession count instead of requiring him to face transportation and receipt charges. As a result, the defendant avoided a mandatory minimum sentence, and the Government contemplated that the defendant accordingly might receive a sentence below 60 months. The defendant also avoided the 4-level enhancement to the base offense level for an offense of conviction of more than possession. *See* U.S.S.G. § 2G2.2(a)(2). That enhancement would have raised the offense level to 30 and the Guidelines range to 97 to 121 months (rather than the current range of 63 to 78 months). Thus, the defendant has already received a large benefit in the form of a Guidelines range that is 34 to 43 months lower than it would have been with a transportation or receipt conviction. While the Government agrees that a sentence below the Guidelines range would be fair and appropriate, a variance of the magnitude recommended by the Probation Office or sought by the defendant is not warranted.

C. Conclusion

For the reasons set forth above, a sentence below the Guidelines range of 63 to 78 months' imprisonment, but substantially greater than the Probation Office's recommendation of 24 months, would be fair and appropriate in this case.

Respectfully submitted,

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